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In the

Supreme Court of the United States

OCTOBER TERM 1969

No. [illegible]

MACAULEY-NICHOLS TOOL [illegible] corporation, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Claims

J. DUANE VANCE

Counsel for Petitioner

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THE ARGUS PRESS SEATTLE

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INDEX.

	Page
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Treaties, Statutes and Regulations Involved	3
Statement of the Case	3
Procedural Progress of the Case	3
Background Relating to the Treaty Provision as to Fishing and Sealing	4
Background Leading to Regulation	5
Present Situation	8
Position of the Courts Below	8
Petitioner's Position	8
Reasons Relied on For the Allowance of This Writ	10
This Case Involves an Important Question of Federal Law in the Interpretation of the "Stevens" Treaties and Directly Raises the Problems Left Open by *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. Washington*, 315 U.S. 68 (1942)	10
Conclusion	16

INDEX TO APPENDIX

Opinions of the Courts Below	1A
United States Court of Claims	1A
Indian Claims Commission	3A
Treaty with the Makah, January 31, 1855, 12 Stat. 939, Proclamation April 18, 1859, Ratified March 8, 1859	19A
International Convention—Fur Seals, July 7, 1911, 37 Stat. at L. (Treaties and Conventions) p. 68—President's Proclamation	24A
Sealing Laws—16 U.S.C. § 631b	36A
Sealing Acts, prior to 16 U.S.C. 631	37A
Canada—Halibut Fishing Convention, January 23, 1937, 30 Stat. at L. 1351, President's Proclamation August 4, 1937	38A

Page

Northern Pacific Halibut Fishery, Northern Pacific Halibut Act of 1937, 16 U.S.C.A. § 772.....45A

Regulations of International Fisheries Commission Adopted Pursuant to Pacific Halibut Fishery Convention between the United States of America and the Dominion of Canada, July 29, 1937.....48A

Jurisdiction Claims Considered, 25 U.S.C.A. § 70a..53A

Judgment or Decree of Court Below, 7 Indian Claims Commission 417, April 15, 1959.....55A

TABLE OF CASES

The James G. Swan, 50 Fed. 108 (U.S. D.C. Wash.) 10

Kennedy v. Becker, 241 U.S. 556 (1916)..... 13

Makah Indian Tribe v. Shoettler, 192 F.2d 224..10, 12, 14

McCauley v. Makah Tribe, etc., 128 F.2d 867..... 10

Seufert Brothers Co. v. United States, 249 U.S. 194 (1919) 10

State v. Alexis, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041 11

State v. Arthur, 74 Ida. 251, 261 P.2d 135..... 11

State v. McConville, 65 Ida. 46, 139 P.2d 485..... 11

State v. McClure, 127 Montana 534, 268 P.2d 629..... 11

State v. Meninock, 115 Wash. 528, 197 Pac. 641.....11, 12

State v. Satiacum, 50 Wn.2d 513, 314 P.2d 400.....11, 14

State v. Towessnute, 89 Wash. 478, 154 Pac. 805..... 11

State v. Wallahee, 143 Wash. 117, 255 Pac. 94..... 11

Tulee v. Washington, 7 Wn.2d 124, 107 P.2d 280, 315 U.S. 68 (1942).....8, 10, 13, 16

United States v. Alaska Packers Association, 79 Fed. 152 (U.S. D.C. Wash.).....10, 13

United States v. Kagama, 118 U.S. 375 (1886)..... 11

United States v. Taylor, 3 Wash. Terr. 88, 13 Pac. 333 (1887) 11

United States v. Winans, 198 U.S. 371 (1905) 8, 10, 13, 15

Ward v. Race Horse, 163 U.S. 504 (1896)..... 13

TREATIES AND REGULATIONS

	Page
50 C.F.R. Part 301	3, 48A
Canada—Halibut Fishery Convention, 50 Stat. at L. 1351	3, 38A
International Convention-Fur Seals, 37 Stat. at L. (Treaties and Conventions) p. 68	3, 24A
Treaty with Makah, 1855, 12 Stat. p. 939	3, 19A

STATUTES

16 U.S.C. § 631	3, 36A
Northern Pacific Halibut Act of 1937, 16 U.S.C., § 772	3, 45A
Indian Claims Commission Act, 25 U.S.C., § 70	3, 4, 53A
28 U.S.C. § 1255(1)	1

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OCTOBER TERM 1960

MAKAH INDIAN TRIBE, a corporation, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

No. .....

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Claims

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner Makah Indian Tribe, a corporation, prays that a writ of certiorari issue to review the Order of the United States Court of Claims entered in the above-entitled case on December 1, 1960.

CITATIONS TO OPINIONS BELOW

The Order of the Court of Claims of December 1, 1960, is printed at Appendix p. 1A, *infra*. There was no opinion by the Court, only by the dissenter, which is unreported. The opinion of the Indian Claims Commission of April 15, 1959, printed in Appendix p. 3A, *infra*, is reported at 7 Indian Claims Commission 477.

JURISDICTION

The judgment and order of the Court of Claims was made and entered on the 1st day of December, 1960, Appendix p. 1A, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1255 (1).

QUESTIONS PRESENTED

Prior to 1855 the Makah Indians subsisted almost entirely on the products of the sea, a substantial proportion of which consisted of seal and halibut. Their rights to these were unrestricted and unregulated.

By the provisions of the Treaty of 1855 between the Makah Indian Tribe and the United States, the Indians were "further secured" in their rights to fish and seal. The Whites were granted the right to fish "in common" with the Indians. Thereafter the Whites so plundered the halibut and seal resources that the very existence thereof was threatened. Regulation was reasonably required to control the depredation of the Whites. The regulations, imposed pursuant to International Treaties, were made equally (as to halibut) or substantially so (as to seal), applicable to the Makah Indians, and were of such nature as to practically eliminate the Indian catch.

1. Are such regulations a breach of the Treaty of 1855, without any showing that the fishing or sealing of the Indians were any threat to the resources or the rights of the Whites?

2. Is it a fair construction of the Treaty to say that the right to take halibut is "further secured" to the Indians in regulations which impose seasonal limitations and other restrictions which, as a practical matter, manifestly favor the Whites?

3. Is it a fair construction of the Treaty to say that the right to take seal is "further secured" to them by regulations which limit their right to take seal to the

archaic and aboriginal methods employed by them in 1855?

TREATIES, STATUTES AND REGULATIONS INVOLVED

The Treaties involved are:

1. Treaty with Makah, 1855, 12 Stat. p. 939, Appendix p. 19A, reading in part as follows:

> "The right of taking fish and of whale or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States. * * * "

2. International Convention-Fur Seals, 37 Stat. at L. (Treaties and Conventions) p. 68, Appendix p. 24A.

3. Canada—Halibut Fishery Convention, 50 Stat. at L. 1351, Appendix p. 38A.

Statutes involved are:

1. 16 USC, Sec. 631, Appendix p. 36A, and its predecessor Acts. See list at Appendix p. 37A.

2. Northern Pacific Halibut Act of 1937, 16 USC, Sec. 772, Appendix p. 45A.

3. Indian Claims Commission Act, 25 USC, Sec. 70, Appendix p. 53A.

Regulations involved are:
50 CFR, Part 301, Appendix p. 48A.

STATEMENT OF THE CASE

Procedural Progress of the Case

The instant cause arises from a claim for damages filed by the petitioner against the United States before

the Indian Claims Commission, pursuant to the terms of the Indian Claims Commission Act, 25 USC, Sec. 70A, Appendix p. 53A. The substance of the claim was, and is, that the United States breached its treaty with the petitioner regarding the Indians' right to seal and take halibut. The Indian Claims Commission entered its order on April 15, 1959, dismissing petitioner's action. Appendix p. 55A. The matter was appealed to the Court of Claims pursuant to the provisions of the Indian Claims Act, 25 USC Sec. 70(s), and on December 1, 1960, the Court of Claims entered its order affirming the dismissal, one Judge dissenting. Appendix p. 1A.

The Indian Claims Commission found that the petitioner was an identifiable group of American Indians within the meaning of Section 2 of the Indian Claims Act, and had the capacity to maintain the suit and that the matter was properly before the Commission under Clause 1 of Section 2 of the Indian Claims Commission Act, but dismissed the petition on the grounds that no breach of treaty was shown.

Background Relating to the Treaty Provision as to Fishing and Sealing

At the time of the treaty of 1855, the Makah Indians occupied the Northwest tip of the continental United States, sometimes known as Cape Classet, or more commonly known as Cape Flattery. The Makah Indians were of different ethnic origin than other continental United States Indians. Seventy-five to ninety per cent of their subsistence was obtained from the sea. They were greatly noted for their seafaring ability. The

Claims Commission quoted the following from Swan, a noted Northwest historian:

> "* * * * The Makahs are particularly dextrous in handling their canoes, and proceed in them fearlessly many miles from land in pursuit of whales or seals, or for fishing in the halibut banks fifteen miles northwest from the Cape."

When Governor Stevens came to negotiate the treaty with the Makah Indians, they informed him that their subsistence depended upon fish and seal and in particular the halibut. The minutes kept by Governor Stevens reflect that one Indian said:

> "He was willing to sell his land: All he wanted was the right of fishing"

and another:

> "He wanted the sea. That was his country."

and that Governor Stevens assured them of their continued rights to fish and seal and that he promised them lines, implements and materials to use in these endeavors.

The fur seal was important not only for the meat but because the fur was used for clothing, rugs, blankets and doors of the long house. The blubber was made into oil. The stomach of the seal was cleaned and used to store seal oil. Seal oil was used for cooking and for fruit and vegetable preserving and as a medicinal dressing on the body and was sold in large quantities at the time of the treaty. Seal bladders and whole seal skins were tied and used for floats in harpooning whale and other seal and as floats to which to attach the large

halibut hooks. The halibut was their most important food fish because it cured and dried better than other species.

Background Leading to Regulation

The fur of the seal was of course valuable to the white man. Within 50 years after the execution of the Treaty the white man by the use of sealing schooners and firearms had reaped a tremendous harvest and threatened the seal herd with extinction. To bring an end to this folly the United States of America entered into treaties with Russia and Japan which forbade all sealing except by the United States Government and enacted laws making it a crime to kill or take fur seal. Ever since these treaties and the statutes enacted in enforcement thereof, the United States has harvested the seal crop at the rookeries in the Pribilof Islands. It annually sends its crews to the Islands by modern steamships and probably by air to harvest the seal with the most modern means known. It markets the furs and distributes the proceeds pro rata to the Governments of Russia and Japan in accordance with the treaties. While reserving to itself the right to take seal in the most modern manner, the United States by the treaties with Russia and Japan and by its statutes reserves to the Makah Indians only the right to catch seal in the identical manner which they used in 1855, that is to say, by open boat without deck or motor propulsion and without the use of firearms. It is made a crime for them to hunt seal otherwise. This method is so antiquated and hazardous and the Indians have so far lost their ancient skills that it is impractical to the point that no

seal at all are now harvested by the Makah Indians. This bare reservation to the Makahs of this ancient and now useless method of sealing is now claimed by the United States as being full faith compliance with the treaty.

Similarly, as to halibut, but later in time, and particularly after the railroad to the Northwest made fish more marketable, the whites converged upon the halibut banks, including those traditionally fished by the Makah Indians, in such tremendous numbers and with such improved vessels, gear and techniques that the specie was threatened with extinction. To remedy the crisis created by the greed of the white fishermen the United States entered into a treaty with Canada, creating an international commission with authority to fix limits and seasons for the halibut catch. The seasons so established have been as short as two weeks and as long as two months. No exception was made for the Indians and their fishing in violation of the seasons or limits so established has been made a crime by statute. The shortness of the season established and the fact that it comes in the spring of the year when the weather and seas are often not suitable for the small boat fishing engaged in by the Indians has substantially impaired the Indians' halibut fishing activities.

Although the United States introduced into evidence hundreds of documents relating to the depletion of both the seal herd and the halibut supply, there is no evidence that the activities of the Indians ever posed any threat to the supply of seal or halibut.

Present Situation

At the present time as a result of the restrictions which have been imposed upon the activities of the white man, both the seal and the halibut are at near optimum levels according to the respondent's own expert witnesses and the harvest obtained by the United States Government in the case of the seal and the white fishermen in the case of the halibut is almost all that could possibly be expected from the grounds and the area inhabited by the seal and the halibut, and of this the Indians get little or none.

Position of the Courts Below.

The Indian Claims Commission, Appendix p. 3A *ff.* indicated that it felt the Treaty rights were limited by an implied condition that there was a right to regulate if conservation measures were reasonably necessary, and relied on the language of this Court in *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. Washington*, 315 U.S. 68 (1942); or that treaty rights, even if not so limited, were subject to lawful impairment, if necessary for conservation. Which of these alternate lines of reasoning formed the basis of the Commission's decision is not clear to petitioner.

Petitioner's Position

Petitioner's position is that the only limitation upon the treaty rights is that the Indians agreed to whatever regulation was necessary to restrain the Indians from any conduct which would interfere with the right of the Whites to fish "in common", and this would include restraining the Indians from destroying the resource.

Petitioner, reading them differently, relies on the same two cases as did the Indian Claims Commission. Judge Madden of the Court of Claims, dissenting, agrees with petitioner in theory that, to impose regulations upon the Indians, consistently with the Treaty, it was not sufficient to show that the regulations were necessary as to the Whites, but it must also be shown that the activities of the Indians had made them necessary:

> "Here, I think the Government should be required to show that it's regulatory purposes could not be accomplished without the restrictions on the Indians. It is clear that the scale of fishing done by the Whites was much larger than that done by the Indians, and the Government has not shown that it could not have done an adequate job of conservation by limiting only the activities of the Whites, and leaving the Indians to pursue their own smaller-scale operations, which they had a right, under the Treaty, to carry on." Appendix p. 2A.

The second, or alternate, basis of decision of the Commission, was that the United States has sovereign power to impose conservation regulations. As to this, petitioner concedes the existence of the sovereign power, but believes that if its exercise violates a treaty (contractual) right of petitioner, a cause of action for damages arises if the sovereign has waived immunity to suit as it has here under the Indian Claims Commission Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT

This Case Involves an Important Question of Federal Law in the Interpretation of the "Stevens" Treaties and Directly Raises the Problems Left Open by *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. Washington*, 315 U.S. 68 (1942)

The treaty here involved is one of the so-called "Stevens" treaties. The name derives from the fact that the treaties were negotiated by the then territorial governor Isaac I. Stevens, as representative of the United States. The so-called "Stevens" treaties are all the treaties which were entered into between the government and the Indians in the Pacific Northwest, then comprising the Washington Territory. The same or similar provisions which are here in issue "further securing" the Indians' fishing right are contained in all of the Stevens' treaties.

The ink was hardly dry on the Stevens' treaties until this provision became the subject of extensive litigation which has continued to the present time. It has three times been before this Court in *United States v. Winans*, 198 U.S. 371, *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), and *Tulee v. Washington*, 315 U.S. 68 (1942).

In addition to these cases this provision was involved in Federal Court litigation in *Makah Indian Tribe v. Shoettler*, 192 F.2d 224, *McCauley v. Makah Tribe, etc.*, 128 F.2d 867; *The James G. Swan*, 50 Fed. 108 (U.S. D.C. Wash.) and *U.S. v. Alaska Packers Association*, 79 Fed 152 (U.S. D.C. Wash.).

As late as 1957, the Washington State Supreme Court

had before it the very issues which are now involved, and was unable to reach a decision. *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400. Prior decisions of the Washington State Supreme Court involving this treaty provision are: *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041. *State v. Meninock*, 115 Wash. 528, 197 Pac. 641. *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94. One case arose before the territory became a state, *United States v. Taylor* (1887), 3 Wash. Terr. 88, 13 Pac. 333. The *Tulee* case likewise arose from the State of Washington, 7 Wn.2d 124, 107 P.2d 280. The Idaho Supreme Court has considered the problem: *State v. Arthur*, 74 Ida. 251, 261 P.2d 135, and in *State v. McConville*, 65 Ida. 46, 139 P.2d 485, and the Montana court in *State v. McClure*, 127 Montana 534, 268 P.2d 629.

The rights, if any, reserved to the Indians by the treaty were even at that time valuable. With the increase in population and the increase in price and utilization of the products of the sea by the Whites, the conflict between the economic interests of the Whites and the treaty rights of the Indians has become tremendous. In general, the regulatory agencies, whether state or federal, have been attuned to the preservation of the resource and the economic interests of the White citizens rather than considerations of the treaty rights of the Indians. As a general rule, the lower Courts, perhaps more acutely aware of the feelings of local citizens than this Court, have been unfriendly to the Indians. As this Court noted in *U.S. v. Kagama*, 118 U.S. 375 (1886):

> "Because of the local ill-feeling, the people of the states where they (The Indians) are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."

The State of Washington was criticized by the Court of Appeals of the Ninth Circuit for its narrow view of petitioner's treaty rights in *Makah Indian Tribe v. Shoettler,* 192 F.2d 224. Judge Mackintosh, of the Washington State Supreme Court in an early decision criticized his colleagues for a narrow interpretation of this treaty provision, saying, in *State v. Meninock,* 115 Wash. 528, 197 Pac. 641:

> "I have no patience with the violation of plain treaty provisions based in fact upon the strength of the violator and the weakness of the violated, but supported in theory by ingenious reasons and excuses."

Petitioner believes that one of the principal purposes of the Indian Claims Act was to provide a remedy in payment for rights so wrongly taken and set those matters to rest. To accomplish this broad purpose, a broad and liberal construction of the claimed rights is indicated, not a narrow one based upon assertions of implied conditions, inherent powers and "ingenious reasons."

In general; in all of these cases the litigants adhered to two extreme positions, which were noted as late as in the *Tulee* decision. These extremes are:

As taken by the regulatory bodies: That the right of the government to regulate fisheries was assumed by the parties to the treaty, *subsilencio*, and therefore the right to regulate the Indians is the same as its right to regulate all others. In general, this line of reasoning relies upon *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Kennedy v. Becker*, 241 U.S. 556 (1916), and see the three decisions of Judge Hanford: *U.S. v. Winans*, 73 Fed. 72; *The James G. Swan*, 50 Fed. 108; and *U.S. v. Alaska Packers Association*, 79 Fed. 152.

As claimed by the Indians: That since their rights to fish were unrestricted at the time of the Treaty and these rights were "further secured" the Treaty assured them of the continued unrestricted right to fish.

In the *Winans* and *Tulee* cases, *supra*, this Court disavowed both extremes, and while upholding the claim of treaty rights against the limitations there sought to be imposed, said, in the *Tulee* case, that the treaty leaves "* * * power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish."

The question which is raised in this case and left open by this language is whether the *necessary* regulations which the treaty "leaves" the power to impose, are only those which are rendered necessary because of over-exploitation by the Indians or whether they may likewise be ones rendered necessary by over-exploitation by the Whites. Otherwise put, may the Whites, by their

own over-exploitation, create a "necessity" which justifies a regulation imposed equally upon the Indians and the Whites. Judge Madden, dissenting below, said:

> "Here, I think the government should be required to show that its regulatory purposes could not be accomplished without the restrictions on the Indians."

In *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400, four Judges of the Washington Supreme Court felt that insofar as the above dictum said that regulations could be imposed upon the Indians *equally with others*, it was contrary to the holding of the case in which it was said. In a concurring opinion, also signed by four Judges of the Washington Court, it was said as follows:

> "The Court (below), however, felt that in such a case as this—where the enforcement of the regulation, if not reasonable and necessary, would infringe a treaty right of the Indian — the burden should be upon the state to show that the violation of the regulation by the Indian threatens the conservation program. I would uphold the trial court in its disposition of the cause, for it is true that the state made no attempt to show that the conservation program was seriously affected by the fishing activities of the defendants or of the Indians generally."

Petitioner believes the holding of *Makah Indian Tribe v. Shoettler*, 192 F.2d 224, is in direct accord with that language.

Petitioner respectfully submits that the opinions of eight Judges of the Washington State Supreme Court,

the decision of the Court of Appeals of the Ninth Circuit, and the decision of the Idaho State Supreme Court support the position of the petitioner as against the decisions below.

The inability of the Court below to define the limits of the power to regulate which this Court in the *Tulee* case said the treaty leaves, results from the failure to identify the source of the power. In the argument in the Court of Claims, counsel for the government asserted that every treaty entered into by the United States was subject to the implied term, condition or reservation of the right of the Government to exercise its police powers for conservation. Such rationale is, indeed, the explanation of some of the earlier decisions on this point. If this were so, then the Indians would have acquired no rights under the trgaty that they would not have otherwise possessed without a treaty, no more than the right to have the government refrain from arbitrary and discriminatory action. That's exactly what the lower Court decided in the *Winans* case, 73 Fed. 72, which was reversed in this Court. To that this Court said:

> "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seem to promise more, and give the word of the nation for more." *U.S. v. Winans*, 198 U.S. 371.

Petitioner asserts that a more rational basis of the source of the power to regulate is found in the treaty

itself. The government agreed to further secure the Indians in their fishing rights, and the Indians, in turn, agreed to let the Whites fish "In common." Since the treaty must be interpreted as the Indians understood it (*Tulee v. Washington*, 315 U.S. 68, and cases cited), it must be interpreted that while the Indians understood that they were to be further secured, they likewise understood that they must not fish in such a way as to destroy the rights of the Whites, which they granted to them. Four Judges of the Supreme Court of the State of Washington in the concurring opinion by Judge Rosellini in *State v. Satiacum*, hold this view and state with emphasis in their opinion:

> *"Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share."*

If this is the source of the power to regulate, then the decision of the Indian Claims Commission was erroneous because the Government neither proved, nor even tried to prove, in defense of its regulations of the Makahs' fishing and sealing, that the activities of the Indians constituted any threat to the resource requiring regulation for conservation.

If the power of regulation was impliedly a condition of the treaty or if threat to the resource by depredation of the Whites justifies regulation of the Indians, then the decision of the Claims Commission is correct.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

J. DUANE VANCE
Counsel for Petitioner.

OPINIONS OF THE COURTS BELOW

Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

App. 5-59

MAKAH INDIAN TRIBE, a corporation
v.
THE UNITED STATES
} ORDER

This case comes before the court on appeal from the Indian Claims Commission, Docket No. 60, filed by the Makah Indian Tribe. Upon consideration thereof, together with the record before the Commission and the briefs and argument of counsel.

IT IS ORDERED this first day of December, 1960, that the decision of the Indian Claims Commission be and the same is affirmed.

Judge Madden dissents from the entry of this order for the reasons stated in his attached memorandum.

BY THE COURT
Marvin Jones, Chief Judge

Makah Indian Tribe—No. Appeal 5-59

MADDEN, *Judge*, dissenting:

I would remand this case to the Indian Claims Commission for findings as to whether it was necessary, in order to accomplish proper conservation of the halibut, to apply the seasonal fishing restriction to the Makah Indians.

The treaty provision here involved is:

> The right of taking fish and of whale or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States.

The Supreme Court, in *United States v. Winans*, 198 U.S. 371 (1905), held that an 1855 Treaty with the Yakima Indians, which provided that "the right of tak-

ing fish at all usual and accustomed places, in common with citizens of the Territory" [of Washington] be further secured to the Yakimas, conferred upon the Yakima's continuing rights, *beyond those which other citizens may enjoy,* to fish at their usual and accustomed places.

Tulee v. Washington, 315 U.S. 68 (1942), reaffirmed this principle, but did say that the Yakima treaty "leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are *necessary* for the conservation of fish." The Court held, however, that the state was without power to charge the Yakimas a fee for fishing. Although the Court recognized that the fee was regulatory as well as revenue-producing, it found that the regulatory purpose could have been accomplished otherwise, and the imposition of the fee was not indispensable to the effectiveness of a conservation program.

Here, I think the Government should be required to show that its regulatory purposes could not be accomplished without the restrictions on the Indians. It is clear that the scale of fishing done by the whites was much larger than that done by the Indians, and the Government has not shown that it could not have done an adequate job of conservation by limiting only the activities of the whites, and leaving the Indians to pursue their own smaller-scale operations, which they had a right, under the treaty, to carry on.

The Indian Claims Commission made no finding as to whether or to what extent it was necessary to limit the Indians' activities as well as those of the whites. For that reason I would remand the case to the Commission to take evidence and make findings on this question, and modify its decision, if the findings made such a modification appropriate.

7 Ind. Cl. Com. 477

BEFORE THE INDIAN CLAIMS COMMISSION

MAKAH INDIAN TRIBE, a Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 60

Decided: April 15, 1959

Appearances,

J. DUANE VANCE, *Attorney for the Plaintiff*

MAURICE H. COOPERMAN, *with whom was Mr. Assistant Attorney General*,

PERRY W. MORTON, *Attorneys for the Defendant*.

OPINION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The Makah Indian Tribe, petitioner herein, filed an amended petition on September 15, 1952, setting forth two distinct claims. One claim calls for a million dollars as additional compensation for lands ceded by the petitioner tribe under the 1855 Makah Treaty (12 Stat. 939), the other asks ten million dollars as damages for alleged deprivations of fishing rights reserved by the petitioner tribe under Article IV of said treaty. In order to facilitate early determination of the issues involved in each claim, the Commission ordered severance and the assignment of separate docket numbers. Ac-

cordingly, the land cession claim now bears Docket No. 60-A, while the present Docket No. 60 is concerned only with the question of defendant's liability, if any, for alleged deprivation of petitioner's right to take fur seals and halibut.[1]

Preliminary to determining the ultimate issue of liability, the question of petitioner's capacity to bring and maintain the action is also up for decision. We shall make special note of this as our decision in this regard will in like manner adjudicate the identical question in Docket 60-A, since severance of both claims occurred after hearing the evidence needed to resolve this point. Defendant in its answer and brief has not seriously challenged petitioner's legal capacity before the Commission.

It would seem that from the earliest recorded history of our country, there has always existed a certain group of American Indians closely identified with the extreme northwest portion of what is now Washington State. This group inhabited the region around Cape Flattery and the entrance to the Juan de Fuca Straits, and is singularly identified by its distinctive linquistic characteristics. The members of this tribe were well known for their sea faring prowess, earning great reputations as whalers and deep sea fishermen. These coastal Indians have at times been called Makah, Classets, people of the Cape, and Cape Flattery Indians, among others.

From the early Spanish and English explorers we find first recorded contact with the Makahs of any worth. Of particular interest and historical value are the early visits of famed English explorer, George Vancouver, around the turn of the nineteenth century.

[1]Petitioner has subsequent to the filing of its petition and the conclusion of the hearing thereon, abandoned any claim for violation of its fishing rights insofar as the taking of salmon is concerned. Petitioner's brief, pages 4, 5, 29. Petitioner's proposed finding VII.

Later on toward 1850, men from the Hudson Bay Trading Company, American Government officials and ethnologists had increased the frequency of white contact with the Makah tribe.

George Gibbs, who served as secretary to Governor Isaac Stevens' treaty Commission and who was present and participated in the 1855 Makah treaty, made several pre-treaty visits to the Makahs, and as a result he wrote extensively on the life, customs, and habits of these Pacific Coast Indians. After the 1855 treaty the petitioner tribe retired to the reservation life at Neah Bay, Washington, where its members have continued a form of tribal organization ever since.

In the post treaty era James Swan, famous as an ethnologist and expert on Puget Sound Indians, spent a great deal of time with the Makahs, having taught among them at the reservation during the 1860's. Under the direction of the Smithsonian Institute he compiled and published in 1868 a comprehensive and scholarly report on the Makah Indians entitled, "The Indians of Cape Flattery."

In 1914 Edward P. Curtis, noted author of the twenty volume masterpiece, "The North American Indian," and another Indian expert, visited the tribe at their Neah Bay reservation.

Population wise, the best estimates at the time of the 1855 treaty place the number of Makah at slightly less than 800 while the 1950 census sets the figure at 550 souls.

From all the evidence and facts as set out in more detail in the Commission's findings 1 through 4, the Commission finds that the petitioner tribe is an identifiable group of American Indians within the meaning of Section 2 of the Indian Claims Commission Act (60

Stat. 1050), and have the capacity to maintain this suit. In addition, we find that the petitioner tribe is the representative of those Makah Indians whose ancestors negotiated the Makah Treaty of January 31, 1855, at Neah Bay, Washington.

Turning now to the principal task of determining whether or not defendant is liable for alleged deprivations of petitioner's fishing rights, the Commission finds that the legal basis for this claim arises solely from the language of Article IV of the 1855 treaty. Thus as pleaded, petitioner's claim is properly before us under Clause (1) of Section 2 of our Act.[2]

Article IV, insofar as pertinent, reads as follows:

> "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * "

There is nothing new or unique in finding such a provision in the 1855 Makah treaty. More than a half dozen treaties contain substantially similar provisions for the benefit of other northwest Indian tribes, who, like the Makah tribe, enjoyed a maritime economy.[3]

Petitioner contends that since the 1855 treaty, the United States has entered into certain international agreements, and by so doing, has abridged and deprived the petitioner of its reserved treaty rights such as in

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[2]25 U.S.C. 70(a) . . . "(1) claims in law or equity arising under the constitution, laws, treaties of the United States . . ."

[3]See—Treaty with the Nisqually, Puyallup, etc. (1853) 10 Stat. 1132, Art. 3; Treaty with the Duwamish, Suquamish, etc. (1855), 12 Stat. 927, Art. 5; Treaty with the Skallum (1855), 12 Stat. 933, Art. 4; Treaty with the Walla Walla, etc. (1855), 12 Stat. 945, Art. 1; Treaty with the Yakima (1855), 12 Stat. 951, Art. 3; Treaty with the Tribes of Middle Oregon (1855), 12 Stat. 963, Art. 1; Treaty with the Quinault, etc. (1855), 12 Stat. 971, Art. 3; Treaty with the Flatheads (1855), 12 Stat. 975, Art. 3.

this case; to take the fur seal and to deep sea fish for halibut. The international agreements relied upon are: the four-power convention of 1912 between the United States, Canada, Japan, and Russia, as amended and implemented by legislation, which convention was concluded for the preservation and protection of the fur seals and sea otter which frequent the waters of the North Pacific; and, the convention of 1924 between Canada and the United States, as amended and implemented by legislation, which convention established the International Fisheries Commission to administer a program for the preservation of the halibut fishery of the Northern Pacific Ocean (87 Stat. 1538; 48 Stat. 648).

If we have judged petitioner's legal theory correctly in its brief, its argument is as follows. The fishing rights reserved under Article IV of the 1855 Makah Treaty are inviolable to such an extent that the Government cannot interfere with them in any manner even if it undertakes to enact or conclude a treaty or pass reasonable laws pursuant thereto for the avowed purpose of conserving and protecting the very subject matter upon which the exercise of the right depends. No one disputes the paramount right of the United States, when acting in its sovereign capacity, to take needed steps to protect and conserve game, wild life, and other natural resources, but petitioner contends that, if such action interferes in any manner with its treaty rights, then the defendant must respond in damages. Thus, the crux of petitioner's argument centers about a proper interpretation of the extent of the rights reserved, for petitioner states quite clearly in its brief:

> "Basically the problem presented in this case is a legal one involving a determination of what the plaintiff's rights were under a proper construction of the Makah Treaty." (Pet. Brief, p. 2)

Needless to say, defendant argues quite the contrary, its position being that such fishing rights claimed by petitioner tribe under Article IV of the 1855 treaty were gratuitously given by the Government, that they are merely co-equal in extent with the rights of other citizens, and as such are subject to interference and control by necessary conservation measures.

With the aid of the bare judicial expressions on the subject which we can muster, the Commission is of the opinion that the answer to the question lies somewhere between the extreme positions, taken by the party litigants, and, that petitioner's fishing rights reserved under the 1855 treaty are indeed superior in some respects, that they cannot be abrogated or cut off in toto, but nevertheless are not so unlimited and untouchable that they cannot be tempered, accommodated, or adjusted to fit changing circumstances such as when the Government finds it necessary to take reasonable steps to conserve and protect fish and wildlife and other natural resources which belong collectively to all the people.

In the case of *United States v. Winans*, 198 U.S. 371 (1905), the Supreme Court was presented an opportunity to construe the limitations of a substantially similar fishing right reserved by the Yakima Indians under their 1855 treaty (12 Stat. 951). The Court made it quite clear that such reserved fishing rights are indeed superior in many ways to any corresponding right enjoyed by the white citizenry; so much so, that they impose a servitude on lands subject to sale and even the future grantees and the State of Washington through its licensing regulations could not exclude these Indians from exercising those rights on lands ceded by them.

Of particular interest and pertinent to our discussion is the following language from the court's opinion in the *Winans* case:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away, * * *." (198 U.S. p. 381)

And finally near the end of its opinion the Court made the following statement:

> "And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places'. Nor does it restrain the state unreasonably, if at all, in the regulation of the right." (198 U.S., p. 384)

A few years later in the case of *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), the Court reaffirmed the principle of the *Winans* case, and extended it with respect to places outside of a ceded area.

In 1942, the Yakima reserved fishing rights under its 1855 treaty were again before the Court in the case of *Tulee v. State of Washington*, 315 U.S. 681. The state had convicted a Yakima Indian for salmon fishing without first having obtained a license and paying the proper fee. His conviction was reversed and the state's licensing statute held invalid in this instance as violative of the Yakima's reserved fishing rights. The Court reasoned that imposing a license fee in this manner was a charge on the Yakima's exercise of his treaty rights, since such licensing provision smacks more of a revenue raising measure than a purely regulatory provision indispensable to the state's conservation program. Nevertheless, in approving its former holdings in the *Winans*

and *Seufert* cases, the Court in clear, unmistakable language delimited to some extent such Indian fishing rights where state conservation programs are in effect:

> "* * * that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question." 315 U.S. 681, 684.

In 1951, in the case of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, the United States Court of Appeals, Ninth Circuit, applying the rule of the *Tulee* case passed upon the very Makah treaty fishing rights with which we are concerned. In that case the court held that where by treaty the Makahs were guaranteed the right of taking fish at accustomed grounds and stations, the burden was on the State of Washington to show that the regulations promulgated by it which limited the right as to time and manner, were necessary for the conservation of fish.

The Commission has read with some interest the several state cases cited by petitioner in its brief. While they are informative, we fail to see their pertinency or in what manner they can possibly alter or change a Supreme Court decision clearly delimiting an Indian treaty right. Whether or not a state finds that its own conservation laws and regulations interfere with or even abrogate per se Indian fishing rights reserved under a treaty provision, such decision offers no challenge to the Supreme Court's interpretation that the same treaty right may be limited to some extent by state regulations necessary to conserve fish. In the instant case there is no problem of possible conflict between state and federal law; nor is the Commission faced with any interpretative ambiguities surrounding this par-

ticular treaty provision. In our view the Supreme Court's language is clear in the *Tulee* case and we will follow it.

Having concluded that the Makah fishing rights reserved under the 1855 treaty can be limited to some extent by reasonable and necessary conservation measures we reach the question whether those international agreements, laws, and regulations adopted for the avowed purpose of protecting, conserving and rehabilitating seal and halibut are so offensive and an unwarranted breach of petitioner's treaty rights that the defendant has incurred liability.

The historical growth of the Alaska fur seal industry and the great northern Pacific halibut fishing are akin in many respects. Both ran the gamut from early superabundance to massive, reckless exploitation bordering upon complete destruction of the species, to government intervention through international agreements and regulation to conserve and rehabilitate seal and halibut, and, finally, success through a carefully administered cooperative effort between the interested countries resulting in a marked increase in total yield, coupled with a noticeable improvement in the physiological development of both species.

Prior to and at the time of the 1855 Makah Treaty, petitioner's ancestors had hunted the Alaska fur seal for years with marked success. Annually the great seal herds would migrate northward off the Pacific coast toward their breeding grounds among the Pribilof Islands in the Bering Sea. Putting out to sea in their long canoes the Makah sealers would contact the herd and then with great stealth they would silently go among the animals as they slept on the ocean surface, and kill them with spears and harpoons. This type of

sealing, killing them on the ocean surface, is known as "pelagic sealing."

With the purchase of Alaska from Russia in 1867, the United States acquired jurisdiction and control of the Pribilof Islands and in like manner inherited the lucrative sealing industry. Thereafter, the Government executed exclusive long-term leases with private companies who took seals under fixed quotas. Sealing was then a Government monopoly and the annual yield of skins was most satisfactory in producing a sizeable revenue.

Around 1879, pelagic sealing was growing in intensity, conducted on a large scale by independent sealers operating with firearms from ocean-going vessels. British, Canadian, and even Japanese sealing vessels began to operate without restriction in the Bering Sea. Pelagic sealing was necessarily indiscriminate, and the slaughter of females cut seriously into the reproductive ability of the species. Usually her death resulted in the death of an unborn pup or that of the new-born pup left alone upon the Pribilof Island rookeries to face inevitable starvation. By 1890 the fur seal breeding stock had suffered a serious decline. In 1893 efforts of the United States to unilaterally police and regulate sealing in the Bering Sea were successively challenged on jurisdictional grounds by Great Britain. In that year the special Paris Arbitration Board, to whom the important jurisdictional question had been certified by mutual agreement, ruled that the United States could exercise no sovereign authority over foreign nationals beyond the customary three-mile limit; henceforward, the Bering Sea was no longer *mare clausum*.

Thereafter by convention Britain and the United States sought to restrict the number of seals taken by putting into effect a quota system. This failed simply

because pelagic sealing, the real culprit, remained unchecked. Only absolute prohibition of this practice would save the rapidly diminishing seal herds.

Not until 1911 was there concluded a firm international agreement between Great Britain, United States, and Japan calling for a fifteen-year suspension on pelagic sealing. Its avowed purpose was the preservation and protection of the fur seals which frequent the waters of the North Pacific Ocean. Notably exempt from the prohibition against pelagic sealing were the Pacific Coast Indians who could engage in the practice as traditionally conducted; that is, without firearms and from open canoes. This exemption has been carried forward in succeeding conventions and in all implementing legislation thereto and is in effect today.[4]

In the years that followed the ratification of the 1911 convention, the results achieved through suspension of pelagic sealing have been most gratifying. The annual yield of seal skins has increased steadily and the threat of extinction of the species, once so imminent, has been removed.

The Commission is convinced from all the evidence and facts as detailed in the Commission's findings 7 through 12 that the circumstances subsequent to the conclusion of the 1855 Makah Treaty have justified the defendant's action in entering into international agreements for the preservation and protection of the Alaska fur seal. The regulations so adopted pursuant to said

[4] 16 U.S.C. 634—Natives permitted to carry on pelagic fishing. "The provisions of sections 632 and 633 of this title shall not apply to Indians, Aleuts, or other aborigines dwelling on the American coast of the waters mentioned in section 632 of this title who carry on pelagic sealing in canoes or undecked boats propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, and manned by not more than five persons each, in the way hitherto practiced by said Indians, Aleuts, or other aborigines, and without the use of firearms . . ."

agreements are reasonable and necessary conservation measures. Exemption has always been made for the Pacific Coast Indians, including the petitioner, to engage in pelagic sealing as traditionally practiced by their ancestors, namely without firearms and from open canoes. This was the approved method of the Makahs at the time of the 1855 Makah Treaty and as such does not appreciably interfere with or undermine the purpose of the regulations. Therefore such international agreements, laws, and regulations do not abrogate the petitioner's right to take seal as reserved under Article IV of the 1855 Makah Treaty as judicially interpreted by the Supreme Court.

We reach the same conclusion on the question of there being violation of petitioner's treaty rights relative to halibut fishing, and for substantially the same reason.

Up until 1888 deep sea halibut fishing off of Cape Flattery and the Juan de Fuca straits was generally the occupation of the northwest coast Indians, halibut being a prime food item. The favorite Makah halibut fishing grounds were the Swiftsure Banks which lay offshore some eighteen miles.

With the completion of transcontinental railway communication and the development of refrigerated cars, needed impetus was given to commercial fishing, so much so that its rapid expansion extended coastwise over a two thousand mile area and up into the Bering Sea. In a short period of time many fishing vessels of various sizes and description, all equipped with modern highly efficient gear, were clustered on the better known banks. It was not long before these highly productive areas felt the impact of their concerted efforts. With the increase in total yield of the number of halibut taken there was a resultant decrease in the number

taken per unit of gear. In other words, it took more and more equipment to land the corresponding number of fish, a strong indication that depletion was setting in. Contributing to this decline was the important biological fact that the Pacific halibut's rate of growth is painfully slow with the female reaching maturity at twelve years of age. It was quite possible then that by overfishing a given area total depletion could be accomplished within the maturation period of a fish while incapable of reproduction.

Mutual concern over the problem of conserving the rapidly expiring halibut fishery was expressed by Canada and the United States. Early attempts at completing a program of uniform regulation fell to the wayside due to Congressional inaction in adopting the recommendations of a joint study commission. Finally in 1924 Canada and the United States concluded a treaty establishing the International Fisheries Commission to administer a program for the preservation of the Northern Pacific halibut fishery.

The Commission's prime power aimed at restricting the total catch rests in its ability to limit the open season for taking the halibut. Artificial propagation of the species has proven scientifically unsound. Areas are fixed and annual quotas established therein. Enforcement of the regulations, which are applicable to all fishermen, Indians included, is left up to the individual governments. Subsequent conventions of 1930 and 1953 have continued and strengthened the regulatory powers of the halibut commission.

Over the years the results of the halibut commission's regulatory policy have been most gratifying. The trend toward depletion has been arrested, and replenishment of exhausted stocks has been progressing through normal reproduction to such an extent that

the known fishing banks are steadily approaching the point of optimum yield. This growth in abundance has been accompanied by improvement in the overall physical condition of the species.

Having set out in detail in the Commission's Findings 13 through 21, the facts pertinent to the issue of petitioner's fishing rights, as they relate to halibut, we find and conclude that the international agreements and regulations adopted thereunto, designed to protect and conserve the Northern Pacific halibut fishery, do not *per se* breach the petitioner's reserved fishing rights under the 1855 Makah Treaty. The Makah fishing rights, as we have indicated earlier, are not so absolute and inviolate that they cannot be adjusted and limited by regulations which, as demonstrated to our satisfaction in this case, are reasonable and necessary to insure conservation of the species.

While the regulations on certain occasions might prove somewhat irksome and inconvenient to the Indians by regulating the time and manner in which they may fish for halibut, it has been the growth and sharp competition of commercial fishing more than anything else that has interfered with the Makah's *ability* rather than their *right* to fish. Customary "hand line" fishing methods as practiced by the Makahs with their present equipment cannot compete volume wise with the "long line" commercial fishing boats, and acquiring and outfitting a modern fishing vessel is prohibitively expensive to the petitioner tribe.[5]

[5]Contrary to the position taken by the petitioner tribe, the Commission is of the opinion that any question involving a breach of promise by the United States to supply periodically to the Makah Tribe new fishing gear and other equipment is strictly collateral to settling the present controversy of the extent of petitioner's fishing rights under Article IV of the 1855 Makah Treaty; and, as such, might be considered, if at all, as one of the issues in Docket 60-A relative to adequacy of the consideration paid for the Makah land cession under that treaty.

Even if it is conceded that the present regulations restricting the length of the season make it more difficult for the Makah fisherman to fish halibut commercially, still petitioner has not proven a breach of treaty rights. Looking at all the evidence in a light most favorable to the petitioner we do not find, among other things, that the present Makah's daily sustenance requirements depend wholly upon halibut, or even that the regulations in question have been enforced against those Indians who non-commercially fish for halibut, or that in complying with these regulations the Makah Indian is unable to take sufficient halibut to sustain his immediate wants or those of his family. This is not to say that proof of any one or all of the above facts would necessarily support petitioner's claim, but nevertheless such facts do picture a situation more compatible and consistent with the nature and substance of the fishing rights reserved under the 1855 treaty.

In reaching our decision the Commission has considered the provisions of the 1855 Treaty in light of the conditions existing at that time. In so doing, we cannot attribute to the 1855 treaty officials, as petitioner seemingly would have us do, a prophetic knowledge of future events; the technical advances in the science of fishing, and tremendous growth of the commercial halibut fishery and the Indians' participation therein, and the acquisition and development of the Pribilof sealing industry. Certainly neither treaty participant in 1855 could have contemplated that the then superabundance of halibut and seals would undergo reckless and destructive exploitation in the years to come, and that this in turn would result in the adoption of vital conservation measures through cooperative international agreements. The Commission, therefore, is of the opinion that the Makah fishing rights reserved

under the 1855 treaty are in no sense commercial rights and on the contrary mean simply that the Makah Indians, as in the case of other west coast fish eating Indians, were to continue to have the right of taking fish and other marine products from the usual and accustomed places in order to satisfy immediate wants and provide the necessary sustenance for themselves and their families consistent with their then subsistence economy.

For this Commission to go ahead now and supply a more expansive interpretation to the 1855 Makah fishing rights in the form of a license for the petitioner tribe to adopt and utilize without any restriction modern techniques for taking seal and halibut, would not only frustrate and defeat present applicable conservation measures but is not warranted or justified under either the facts or law in this case.

In view of the above, plaintiff's case is dismissed.

EDGAR E. WITT
Chief Commissioner

I concur:
WM. M. HOLT
Associate Commissioner

TREATY WITH THE MAKAH, 1855

Jan. 31, 1855
12 Stat., p. 939
Proclamation, Apr. 18, 1859
Ratified Mar. 8, 1859

Article of Agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the several villages of the Makah Tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flattery, on behalf of the said tribe and duly authorized by the same.

Article I. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence running westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-deh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately *deded* to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

Article II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the

mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning, which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through said reservation, the Indians being compensated for any damage thereby done by them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Article III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with permission of the owner.

Article IV. *The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States,* and of erecting temporary houses for the purpose of curing, together with the privileges of hunting and gathering roots and ber-

ries on open and unclaimed lands: provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Article V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty-thousand dollars, in the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all of which said sums of money shall be applied to the use and benefits of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Article VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefore accordingly.

Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby,

remove them from said reservation to such suitable places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

Article VIII. The annuities of the aforesaid tribe shall not be taken to pay debts of individuals.

Article IX. The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens thereof, and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agree not to shelter or conceal offenders against the

United States, but to deliver up the same for trial by the authorities.

Article X. The above tribe is desirous to exclude from its reservation the use of ardent spirits, and to prevent its people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter, and farmer for the like term to instruct the Indians in their respective occupations: Provided, however, that it should be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place. And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

Article XII. The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

Article XIII. The said tribe finally agrees not to trade at Vancouver Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

Article XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

INTERNATIONAL CONVENTION—FUR SEALS

July 7, 1911

37 Stat. at L., Treaties & Conventions, p. 68

Convention between the United States and other Powers providing for the preservation and protection of fur seals. Signed at Washington, July 7, 1911; ratification advised by the Senate, July 24, 1911; ratified by the President, November 24, 1911; ratified by Great Britain, August 25, 1911; ratified by Japan, November 6, 1911; ratified by Russia, November 4, 1911; ratifications exchanged at Washington, December 12, 1911; proclaimed, December 14, 1911.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a Convention between the United States of America, Great Britain, Japan and Russia providing for the preservation and protection of the fur seals which frequent the waters of the North Pacific Ocean,

was concluded and signed by their respective Plenipotentiaries at Washington, on the 7th day of July, one thousand nine hundred and eleven, the original of which Convention, being in the English language, is word for word as follows:

The United States of America, His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India; His Majesty the Emperor of Japan, and His Majesty the Emperor of all the Russias, being desirous of adopting effective means for the preservation and protection of the fur seals which frequent the waters of the North Pacific Ocean, have resolved to conclude a Convention for the purpose, and to that end have named as their Plenipotentiaries:

The President of the United States of America, the Honorable Charles Nagel, Secretary of Commerce and Labor of the United States, and the Honorable Chandler P. Anderson, Counselor of the Department of State of the United States;

His Britannic Majesty, the Right Honorable James Bryce, of the Order of Merit, his Ambassador Extraordinary and Plenipotentiary at Washington, and Joseph Pope Esquire, Commander of the Royal Victorian Order and Companion of the Order of St. Michael and St. George, Under Secretary of State of Canada for External Affairs;

His Majesty the Emperor of Japan, Baron Yasuya Uchida, Jusammi, Grand Cordon of the Imperito Order of the Rising Sun, his Ambassador Extraordinary and Plenipotentiary at Washington; and the Honorable Hitoshi Dauke, Shoshii, Third Class of the Imperial Order of the Risin g Sun, Director of the Bureau of Fisheries, Department of Agriculture and Commerce;

His Majesty the Emperor of all the Russias, the Honorable Pierre Botkine, Chamberlain of His Majesty's Court, Envoy Extraordinary and Minister Plenipotentiary to Morocco, and Baron Boris Nolde, of the Foreign Office;

Who, after having communicated to one another their respective full powers, which were found to be in due and proper form, have agreed upon the following articles:

ARTICLE I

The High Contracting Parties mutually and reciprocally agree that their citizens and subjects respectively, and all persons subject to their laws and treaties, and their vessels, shall be prohibited, while this Convention remains in force, from engaging in pelagic sealing in the waters of the North Pacific Ocean, north of the thirtieth parallel of north latitude and including the Seas of Bering, Kamchatka, Okhotsk and Japan, and that every such person and vessel offending against such prohibition may be seized, except within the territorial jurisdiction of one of the other Powers, and detained by the naval or other duly commissioned officers of any of the Parties to this Convention, to be delivered as soon as practicable to an authorized official of their own nation at the nearest point to the place of seizure, or elsewhere as may be mutually agreed upon; and that the authorities of the nation to which such person or vessel belongs alone shall have jurisdiction to try the offense and impose the penalties for the same; and that the witnesses and proofs necessary to establish the offense so far as they are under the control of any of the Parties to this Convention, shall also be furnished with all reasonable promptitude to the proper authorities having jurisdiction to try the offense.

ARTICLE II

Each of the High Contracting Parties further agree that no person or vessel shall be permitted to use any of its ports or harbors or any part of its territory for any purposes whatsoever connected with the operations of pelagic sealing in the waters within the protected area mentioned in Article I.

ARTICLE III

Each of the High Contracting Parties further agrees that no sealskins taken in the waters of the North Pacific Ocean within the protected area mentioned in Article I, and no sealskins identified as the species known as Callorhinus alascanus, Callorhinus ursinus, and Caliorhinus kurilensis, and belonging to the American, Russian or Japanese herds, except such as are taken under the authority of the respective Powers to which the breeding grounds of such herds belong and have been officially marked and certified as having been so taken, shall be permitted to be imported or brought into the territory of any of the Parties to this Convention.

ARTICLE IV

It is further agreed that the provisions of this Convention shall not apply to Indians, Ainos, Aleuts, or other aborigines dwelling on the coast of the waters mentioned in Article I, who carry on pelagic sealing in canoes not transported by or used in connection with other vessels, and propelled entirely by oars, paddles, or sails, and manned by not more than five persons each, in the way hitherto practiced and without the use of firearms; provided that such aborigines are not in the employment of other persons or under contract to deliver the skins to any person.

ARTICLE V

Each of the High Contracting Parties agrees that it will not permit its citizens or subjects or their vessels to kill, capture or pursue beyond the distance of three miles from the shore line of its territories sea otters in any part of the water mentioned in Article I of this Convention.

ARTICLE VI

Each of the High Contracting Parties agrees to enact and enforce such legislation as may be necessary to make effective the foregoing provisions with appropriate penalties for violations thereof.

ARTICLE VII

It is agreed on the part of the United States, Japan and Russia that each respectively will maintain a guard or patrol in the waters frequented by the seal herd in the protection of which it is especially interested, so far as may be necessary for the enforcement of the foregoing provisions.

ARTICLE VIII

All of the High Contracting Parties agree to cooperate with each other in taking such measures as may be appropriate and available for the purpose of preventing pelagic sealing in the prohibited areas mentioned in Article I.

ARTICLE IX

The term pelagic sealing is hereby defined for the purpose of this Convention as meaning the killing, capturing or pursuing in any manner whatsoever of fur seals at sea.

ARTICLE X

The United States agrees that of the total number

of sealskins taken annually under the authority of the United States upon the Pribilof Islands or any other islands or shores of the water mentioned in Article I subject to the jurisdiction of the United States to which any seal herds hereafter resort, there shall be delivered at the Pribilof Islands at the end of each season fifteen per cent (15%) gross in number and value thereof to an authorized agent of the Canadian Government and fifteen per cent (15%) gross in number and value thereof to an authorized agent of the Japanese Government; provided, however, that nothing herein contained shall restrict the right of the United States at any time and from time to time to suspend altogether the taking of sealskins on such islands or shores subject to its jurisdiction, and to impose such restrictions and regulations upon the total number of skins to be taken in any season and the manner and times and places of taking them as may seem necessary to protect and preserve the seal herd or to increase its number.

ARTICLE XI

The United States further agrees that the British of two hundred thousand dollars ($200,000) to Great Britain and the sum of two hundred thousand dollars ($200,000) to Japan when this Convention goes into effect, as an advance payment in each case in lieu of such number of fur-seal skins to which Great Britain and Japan respectively would be entitled under the provisions of this Convention as would be equivalent in each case to two hundred thousand dollars ($200,000) reckoned at their market value at London at the date of their delivery before dressing and curing and less cost of transportation from the Pribilof Islands, such market value in case of dispute to be determined by an umpire to be agreed upon by the United States

and Great Britain, or by the United States and Japan, as the case may be, which skins shall be retained by the United States in satisfaction of such payments.

The United Sttaes further agrees that the British and Japanese share respectively of the sealskins taken from the American herd under the terms of this Convention shall be not less than one thousand (1,000) each in any year even if such number is more than fifteen per cent (15%) of the number to which the authorized killing is restricted in such year, unless the killing of seals in such year or years shall have been absolutely prohibited by the United States for all purposes except to supply food, clothing, and boat skins for the natives on the islands, in which case the United States agrees to pay to Great Britain and Japan each the sum of ten thousand dollars ($10,000) annually in lieu of any share of skins during the years when no killing is allowed; and Great Britain agrees, and Japan agrees, that after deducting the skins of their respective shares, which are to be retained by the United States as above provided to reimburse itself for the advance payment aforesaid, the United States shall be entitled to reimburse itself for any annual payments made as herein required, by retaining an additional number of sealskins from the British and Japanese shares respectively over and above the specified minimum allowance of one thousand (1,000) skins in any subsequent year or years when killing is again resumed, until the whole number of skins retained shall equal, reckoned at their market value determined as above provided for, the entire amount so paid, with interest at the rate of four per cent (4%) per annum.

ARTICLE XII

It is agreed on the part of Russia that of the total

number of sealskins taken annually upon the Commander Islands, or any other island or shores of the waters defined in Article I subject to the jurisdiction of Russia to which any seal herds hereafter resort, there shall be delivered at the Commander Islands at the end of each season fifteen per cent (15%) gross in number and value thereof to an authorized agent of the Canadian Government, and fifteen per cent (15%) gross in number and value thereof to an authorized agent of the Japanese Government; provided, however, that nothing herein contained shall restrict the right of Russia at any time and from time to time during the first five years of the term of this Convention to suspend altogether the taking of sealskins on such islands or shores subject to its jurisdiction, and to impose during the term of this Convention such restrictions and regulations upon the total number of skins to be taken in any season, and the manner and times and places of taking them as may seem necessary to preserve and protect the Russian seal herd, or to increase its number; but it is agreed, nevertheless, on the part of Russia, that during the last ten years of the term of this Convention not less than five per cent (5%) of the total number of seals on the Russian rookeries and hauling grounds will be killed annually, provided that said five per cent (5%) does not exceed eighty-five per cent (85%) of the three-year-old male seals, hauling in such year.

If, however, the total number of seals frequenting the Russian islands in any year falls below eighteen thousand (18,000) enumerated by official count, then the allowance of skins mentioned above and all killing of seals except such as may be necessary for the support of the natives on the islands may be suspended until the number of such seals again exceeds eighteen thousand (18,000) enumerated in like manner.

ARTICLE XIII

It is agreed on the part of Japan that of the total number of sealskins taken annually upon Robben Island, or any other islands or shores of the waters defined in Article I subject to the jurisdiction of Japan to which any seal herds hereafter resort, there shall be delivered at Robben Island at the end of each season ten per cent (10%) gross in number and value hereof to an authorized agent of the United States Government, ten per cent (10%) gross in number and value thereof to an authorized agent of the Canadian Government and ten per cent (10%) gross in number and value thereof to an authorized agent of the Russian Government; provided, however, that nothing herein contained shall restrict the right of Japan at any time and from time to time during the first five years of the term of this Convention to suspend altogether the taking of sealskins on such islands or shores subject to its jurisdiction, and to impose during the term of this Convention such restrictions and regulations upon the total number of skins to be taken in any season, and the manner and times and places of taking them as may seem necessary to preserve and protect the Japanese herd, or to increase its number; but it is agreed nevertheless, on the part of Japan that during the last ten years of the term of this Convention not less than five per cent (5%) of the total number of seals on the Japanese rookeries and hauling grounds will be killed annually, provided that said five per cent (5%) does not exceed eighty-five per cent (85%) of the three-year-old male seals hauling in such year.

If, however the total numoer of seals frequenting the Japanese islands in any year falls below six thousand five hundred (6,500) enumerated by official

count, then the allowance of skins mentioned above and all killing of seals except such as may be necessary for the support of the natives on the islands may be suspended until the number of such seals again exceeds six thousand five hundred (6,500) enumerated in like manner.

ARTICLE XIV

It is agreed on the part of Great Britain that in case any seal herd hereafter resorts to any islands or shores of the waters defined in Article I subject to the jurisdiction of Great Britain; there shall be delivered at the end of each season during the term of this Convention ten per cent (10%) gross in number and value of the total number of sealskins annually taken from such herd to an authorized agent of the United States Government, ten per cent (10%) gross in number and value of the total number of sealskins annually taken from such herd to an authorized agent of the Japanese Government and ten per cent (10%) gross in number and value of the total number of sealskins annually taken from such herd to an authorized agent of the Russian Government.

ARTICLE XV

It is further agreed between the United States and Great Britain that the provisions of this Convention shall supersede, in so far as they are inconsistent therewith or in duplication thereof, the provisions of the treaty relating to the fur seals, entered into between the United States and Great Britain on the 7th day of February, 1911.

ARTICLE XVI

This Convention shall go into effect upon the 15th day of December, 1911, and shall continue in force for

a period of fifteen (15) years from that date, and thereafter until terminated by twelve (12) months' written notice given by one or more of the Parties to all of the others, which notice may be given at the expiration of fourteen years or at any time afterwards; and it is agreed that at any time prior to the termination of this Convention, upon the request of any one of the High Contracting Parties, a conference shall be held forthwith between representatives of all the Parties hereto, to consider and if possible agree upon a further extension of this Convention with such additions and modifications, if any, as may be found desirable.

ARTICLE XVII

This Convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, by His Brittanic Majesty, by His Majesty the Emperor of Japan, and by His Majesty the Emperor of all the Russias; and ratifications shall be exchanged at Washington as soon as practicable.

In faith whereof, the respective Plenipotentiaries have signed this Convention in quadruplicate and have hereunto affixed their seals.

Done at Washington the 7th day of July, in the year one thousand nine hundred and eleven.

CHARLES NAGEL (seal)
CHANDLER P. ANDERSON (seal)
JAMES BRYCE (seal)
JOSEPH POPE (seal)
Y. UCHIDA (seal)
H. DAUKE (seal)
P. BOTKINE (seal)
NOLDE (seal)

And whereas the said Convention has been duly ratified on the part of each of the High Contracting Parties, and the ratifications of the four Governments were exchanged in the City of Washington, on the twelfth day of December, one thousand nine hundred and eleven;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the City of Washington this fourteenth day of December in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-sixth.

WM. H. TAFT

By the President:

P. C. KNOX, Secretary of State.

SEALING LAWS

Title 16 U.S.C.A. Sec. 631b. Pelagic sealing, sealing, or sea otter hunting in certain waters of North Pacific prohibited; use of ports of United States; importing illegally taken skins.

It shall be unlawful, except as hereinafter provided, for any citizen or national of the United States, or person owing duty of obedience to the laws or treaties of the United States, or any vessel of the United States, or person belonging to or on such vessel, to engage in pelagic sealing or sea otter hunting in or on the waters of the North Pacific Ocean; or for any person or vessel to engage in sealing; or for any person or vessel to use any port or harbor other place subject to the jurisdiction of the United States for any purpose connected in any way with the operation of pelagic sealing, sea otter hunting, or sealing; or for any person to transport, import, offer for sale, or have in possession at any port, place, or on any vessel subject to the jurisdiction of the United States, raw, dressed, or dyed skins of sea otters taken contrary to the provisions of this section or, where taken pursuant to section 631c of this title, not officially marked and certified as having been so taken, or raw, dressed, or dyed skins of fur seals taken in or on the waters of the North Pacific Ocean or on lands subject to the jurisdiction of the United States, except seal skins which have been taken under the authority of sections 631a-631r* of this title or under the authority of the respective parties to any fur-seal agreement and which have been officially marked and certified as having been so taken. Feb. 26, 1944, c. 65, Sec. 2, 58 Stat. 101.

Title 16 U.S.C.A. Sec. 631c. Natives permitted to carry on pelagic sealing or sea otter hunting.

*Not pertinent hereto.

Indians, Aleuts, or other aborigines dwelling on the American coasts of the waters of the North Pacific Ocean shall be permitted to carry on pelagic sealing or sea otter hunting without the use of firearms from canoes or undecked boats, propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, and manned by not more than five persons each, in the way heretofore practiced by said Indians, Aleuts, or other aborigines, and shall be permitted to dispose of the skins of fur seals or sea otters so taken as they see fit, but only after such skins have been officially marked and certified as provided in section 631b of this title. The exception made in this section shall not apply to Indians, Aleuts, or other aborigines in the employment of other persons or who shall engage in pelagic sealing or sea otter hunting under contract to deliver the skins to any person. Feb. 26, 1944, c. 65, Sec. 3, 58 Stat. 101.

SEALING ACTS

Act of February 26, 1944, Chap. 65, 58 Stat. 100 *et seq.*, as amended September 27, 1950, Chap. 1056 64 Stat. 1071. 16 U.S.C.A. 631 *et seq.* Supp.

The original Sealing Act of July 27, 1868, is to be found at 155 Stat. at large 240, and was followed by:

Act of July 1870, 16 Stat. 180

Act of March 2, 1889, Chap. 415, 25 Stat. 1009

Act of February 21, 1893, 27 Stat. 472

Act of April 6, 1894, 28 Stat. 52

Act of June 5, 1894, 28 Stat. 85

Act of December 29, 1897, 30 Stat. 226 as amended by the Act of April 21, 1910, 36 Stat. 326

Act of August 24, 1912, 37 Stat. 499

CANADA — HALIBUT FISHERY CONVENTION

January 23, 1937

50 Stat. at L. 1351

Convention between the United States of America and Canada revising the convention for the preservation of halibut fishery of Northern Pacific Ocean and Bering Sea. Signed at Ottawa, January 29, 1937; ratification advised by the Senate, March 23, 1937; ratified by the President, March 29, 1937, ratified by His Majesty in respect of Canada, June 26, 1937; proclaimed, August 4, 1937.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a Convention between the United States of America and Canada, revising the Convention for the preservation of the halibut fishery of the northern Pacific Ocean and Bering Sea, signed at Ottawa May 9, 1930, was concluded and signed by their respective Plenipotentiaries at Ottawa, on the twenty-ninth day of January, one thousand nine hundred and thirty seven, the original of which Convention is word for word as follows:

The President of the United States of America,

And His Majesty, the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Desiring to provide more effectively for the preservation of the halibut fishery of the northern Pacific Ocean and Bering Sea, have resolved to conclude a convention revising the convention for the preserva-

tion of that fishery signed on their behalf at Ottawa on May 9, 1930, and have named as their plenipotentiaries for that purpose,

The President of the United States of America:

Norman Armour, Envoy Extraordinary and Minister Plenipotentiary of the United States of America to Canada: and

His Majesty, for the Dominion of Canada:

The Right Honorable William Lyon MacKenzie King, Prime Minister and Secretary of State for External Affairs;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I

The nationals and inhabitants and fishing vessels and boats of the United States of America and of Canada, respectively, are hereby prohibited from fishing for halibut (Hippoglossus) both in the territorial waters and in the high seas off the western coast of the United States of America, including the southern as well as the western coasts of Alaska, and of Canada, from the first day of November next after the date of the exchange of ratifications of this convention to the fifteenth day of the following February, both days inclusive, and within the same period yearly thereafter.

The International Fisheries Commission provided for by Article III is hereby empowered, subject to the approval of the President of the United States of America and of the Governor General of Canada, to suspend or change the closed season provided for by this article, as to part or all of the convention waters,

when it finds after investigation such suspensions or changes are necessary, and to permit limit, regulate and prohibit in any area or at any time when fishing for halibut is prohibited, the taking, retention and landing of halibut caught incidentally to fishing for other species of fish, and the possession during such fishing of halibut of any origin.

It is understood that nothing contained in this Convention shall prohibit the nationals or inhabitants or the fishing vessels or boats of the United States of America or of Canada, from fishing in the waters hereinbefore specified for other species of fish during the season when fishing for halibut in such waters is prohibited by this Convention or by any regulations adopted in pursuance of its provisions.

It is further understood that nothing contained in this Convention shall prohibit the International Fisheries Commission from conducting fishing operations for investigation purposes at any time.

ARTICLE II

Every national or inhabitant, vessel or boat of the United States of America or of Canada engaged in halibut fishing on the high seas in violation of this Convention or of any regulation adopted under the provisions thereof may be seized by the duly authorized officers of either High Contracting Party and detained by the officers making such seizure and delivered as soon as practicable to an authorized official of the country to which such person, vessel or boat belongs, at the nearest point to the place of seizure, or elsewhere, as may be agreed upon. The authorities of the nation to which such person, vessel or boat belongs alone shall have jurisdiction to conduct prosecutions for the violation of the provisions of this Convention

or any regulations which may be adopted in pursuance of its provisions, and to impose penalties for such violations; and the witnesses and proofs necessary for such prosecutions, so far as such witnesses or proofs are under the control of the other High Contracting Party, shall be furnished with promptitude to the authorities having jurisdiction to all reasonable conduct the prosecutions.

Each High Contracting Party shall be responsible for the proper observance of this Convention, or of any regulations adopted under the provision thereof, in the portion of its waters covered thereby.

ARTICLE III

The High Contracting Parties agree to continue under this Convention the Commission as at present constituted and known as the International Fisheries Commission, established by the Convention for the preservation of the halibut fishery, signed at Washington, March 2, 1923, and continued under the Convention signed at Ottawa, May 9, 1930, consisting of four members, two appointed by each Party, which Commission shall make such investigations as are necessary into the life history of the halibut in the convention waters and shall publish a report of its activities from time to time. Each of the High Contracting Parties shall have power to fill, and shall fill from time to time, vacancies which may occur in its representation on the Commission. Each of the High Contracting Parties shall pay the salaries and expenses of its own members, and joint expenses incurred by the Commission shall be paid by the two High Contracting Parties in equal moieties.

The High Contracting Parties agree that for the purposes of protecting and conserving the halibut fish-

ery of the Northern Pacific Ocean and Bering Sea, the International Fisheries Commission, with the approval of the President of the United States and of the Governor General of Canada, may, in respect of the nationals and inhabitants and fishing vessels and boats of the United States of America and of Canada, from time to time—

(a) divide the convention waters into areas;

(b) limit the catch of halibut to be taken from each area within the season during which fishing for halibut is allowed;

(c) prohibit departure of vessels from any port or place, or from any receiving vessel or station, to any area for halibut fishing, after any date when in the judgment of the International Fisheries Commission the vessels which have departed for that area prior to that date or which are known to be fishing in that area shall suffice to catch the limit which shall have been set for that area under section (b) of this paragraph;

(d) fix the size and character of halibut fishing appliances to be used in any area;

(e) make such regulations for the licensing and departure of vessels and for the collection of statistics of the catch of halibut as it shall find necessary to determine the condition and trend of the halibut fishery and to carry out the other provisions of this Convention;

(f) close to all halibut fishing such portion or portions of an area or areas as the International Fisheries Commission find it to be populated by small, immature halibut.

ARTICLE IV

The High Contracting Parties agree to enact and enforce such legislation as may be necessary to make effective the provisions of this Convention and any regulations adopted thereunder, with appropriate penalties for violations thereof.

ARTICLE V

The present Convention shall remain in force for a period of five years and thereafter until two years from the date when either of the High Contracting Parties shall give notice to the other of its desire to terminate it.

This Convention shall, from the date of the exchange of ratifications, be deemed to supplant the Convention for the preservation of the halibut fishery signed at Ottawa, May 9, 1930.

ARTICLE VI

This Convention shall be ratified in accordance with the constitutional methods of the High Contracting Parties. The ratifications shall be exchanged at Ottawa as soon as practicable, and the Convention shall come into force on the day of the exchange of ratifications.

In faith whereof, the respective plenipotentiaries have signed the present Convention in duplicate, and have hereunto affixed their seals.

Done at Ottawa on the twenty-ninth day of January, in the year one thousand nine hundred and thirty-seven.

NORMAN ARMOUR (seal)

W. L. MACKENZIE KING (seal)

AND WHEREAS the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the city of Ottawa, on the twenty-eighth day of July, one thousand nine hundred and thirty-seven.

NOW, THEREFORE, be it it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this fourth day of August in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States of America the one hundred and sixty-second.

(seal)

FRANKLIN D. ROOSEVELT.

By the President:
CORDELL HULL,
Secretary of State.

Antecedent Treaties:

Halibut Convention of May 9, 1930 (47 Stat. 1872).

Halibut Convention of March 2, 1923 (43 Stat. 1841).

NORTHERN PACIFIC HALIBUT FISHERY

Northern Pacific Halibut Act of 1937
Title 16 U.S.C.A. § 772

Sec. 772b.—Acts unlawful:

(b) any person to transfer to or to receive upon any vessel of the United States, or to bring to any place within the jurisdiction of the United States any halibut caught in Convention waters by the use of any vessel of a nation not a party to the Convention, or caught in Convention waters by any national or inhabitant of the United States or Canada in violation of the Convention or of this subchapter;

(c) any national or inhabitant of the United States to catch, attempt to catch, or to possess any halibut in the territorial waters of the United States or in Convention waters in violation of any provision of the Convention or of this subchapter;

(e) any person within the territory or jurisdiction of the United States to furnish, prepare, outfit, or provision any vessel of the United States or Canada in connection with any voyage during which such vessel is intended to be, is being, or has been employed in catching, attempting to catch, or possessing any halibut in violation of any provision of the Convention or of this subchapter;

(f) any person within the territory or jurisdiction of the United States or any national or inhabitant of the United States within Convention waters knowingly to have or have had in his possession any halibut taken, transferred, received, or brought in, in violation of any provision of the Convention or of this subchapter;

(g) any person to depart from any place within the jurisdiction of the United States in any vessel which departs from such place in violation of the Convention or of this subchapter.

Sec. 772d.—Enforcement; arrest and seizure; detention; testimony of officers:

(a) The provisions of the Convention and of this subchapter and any regulations issued under this subchapter shall be enforced by the Coast Guard, the Customs Service, and the Fish and Wildlife Service. For such purposes any officer of the Coast Guard, Customs, or Fish and Wildlife Service may at any time go on board of any vessel in territorial waters of the United States, or any vessel of the United States or Canada in Convention waters, except in the territorial waters of Canada, to address inquiries to those on board and to examine, inspect, and search the vessel and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel, and use all necessary force to compel compliance.

(b) Whenever it appears to any such officer that any person, other than a national or inhabitant of Canada, on any vessel of the United States is violating or has violated any provisions of the Convention or of this subchapter, he shall arrest such person and seize any such vessel employed in such violation. If any such person on any such vessel of the United States is a national or inhabitant of Canada, such person shall be detained and shall be delivered as soon as practicable to an authorized officer of Canada at the Canadian port or place nearest to the place of detention or at such other port or place as such officers of the United States and of Canada may agree upon.

Sec. 772e.—Penalties and forfeitures:

(a) Any person violating any provision of Section 772b of this title upon conviction shall be fined not more than $1,000 nor less than $100 or be imprisoned for not more than one year, or both.

(c) All provisions of law relating to the seizure, judicial forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof and the remission or mitigation of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this subchapter; Provided, that except as provided in Section 772d of this title all rights, powers, and duties conferred or imposed by this subchapter upon any officer or employee of the Treasury Department shall, for the purposes of this subchapter, be exercised or performed by the Secretary of the Interior or by such persons as he may designate. June 28, 1937, c. 392, Sec. 6, 50 Stat. §325.

REGULATIONS OF INTERNATIONAL FISHERIES COMMISSION ADOPTED PURSUANT TO THE PACIFIC HALIBUT FISHERY CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE DOMINION OF CANADA, SIGNED JANUARY 29, 1937

Regulatory Areas

1. (a) Convention waters which include the territorial waters and the high seas off the western coasts of Canada and the United States of America including the southern as well as the western coasts of Alaska, shall be divided into the following areas, all directions given being magnetic unless otherwise stated.

(b) Area 1A shall include all convention waters southeast of a line running northeast and southwest through Cape Blanco Light, as shown on Chart 5952, published in February, 1935, by the United States Coast and Geodetic Survey, which light is approximately latitude 42° 50′ 14″ N., longitude 124° 33′ 45″ W.

(c) Area 1B shall include all convention waters between Area 1A and a line running northeast and southwest through Willapa Bay Light on Cape Shoalwater, as shown on Chart 6185, published in July, 1939, by the United States Coast and Geodetic Survey, which light is approximately in latitude 46° 43′ 17″ N., longitude 124° 04′ 15″ W.

(d) Area 2A shall include all convention waters off the coasts of the United States of America and of Alaska and of the Dominion of Canada between Area 1B and a line running through the most westerly point of Glacier Bay, Alaska, to Cape Spencer Light

as shown on Chart 8304, published in June, 1940, by the United States Coast and Geodetic Survey, which light is approximately latitude 58° 11′ 57″ No., longitude 136° 38′ 18″ W., thence south one-quarter east and is exclusive of Area 2B and Area 2C and of the nursery areas closed to all halibut fishing in Section 9 of these regulations.

2. (a) The catch of halibut to be taken during the halibut fishing season of the year 1951 from Area 2A shall be limited to approximately 25,500,000 pounds of salable halibut, and from Area 3 to approximately 28,000,000 pounds of salable halibut, and from Area 4 to approximately 500,000 pounds of salable halibut, the weights in each or any such limit to be computed as with heads off and entrails removed.

(b) The catch of halibut to be taken from all areas during the halibut fishing season of the year 1951 shall also be limited to halibut which with head on are 26 inches or more in length as measured from the tip of the lower jaw to the extreme end of the middle of the tail or to halibut which with the head off and entrails removed are 5 pounds or more in weight, and the possession of any halibut of less than the above length or the above weight, according to whether the head is on or off, by any vessel or by any master or operator of any vessel or by any person, firm or corporation, is prohibited.

(c) The International Fisheries Commission shall as early in the said year as is practicable determine the date on which it deems each limit of catch defined in paragraph (a) of this section will be attained, and the limit of each such catch shall then be that which shall be taken prior to said date, and fishing for or catching of halibut in the area or areas to which such limit applies shall at that date be prohibited until

after the end of the closed season as defined and modified in Section 3 of these regulations, except as provided in Section 5 thereof and in Article I of the Convention, and provided that if it shall at any time become evident to the International Fisheries Commission that the limit will not be reached by such date, it may substitute another date.

3. (a) Under the authority of Article I of the aforesaid Convention the closed season as therein defined shall be modified in Areas 1A, 1B, 2A, 3 and 4 so as to end at 12 midnight of the 30th day of April of the year 1951 and to begin at 12 midnight of the 30th day of November unless an earlier date is determined upon for any area under the provisions of paragraph (b) of this section of these regulations, and shall be modified in Areas 2B and 2C so as to end at 12 midnight of the 25th day of July and to begin at 12 midnight of the 4th day of August.

(b) Under authority of Article I of the Convention, the closed season as therein defined shall begin in Areas 2A, 3 and 4 on the dates on which their limits are reached as provided in paragraph (c) of Section 2 of these regulations and the closing of such area or areas shall be taken to have been duly approved unless before the said date either the President of the United States of America or the Governor General of Canada shall have signified his disapproval (the burden of proving any such signification being upon the person alleging it) and provided that the closing date of Area 2A or Area 3, whichever shall be later, shall apply to Areas 1A and 4, unless Area 4 shall have been previously closed under this section of these regulations, and that the closing date of Area 2A shall apply to Area 1B.

10. The use of any hand gurdy or other appliance

in hauling halibut gear by hand power in any dory or small boat operated from a vessel licensed under the provisions of these regulations is prohibited in all convention waters.

11. It is prohibited to retain halibut taken with a net of any kind or to have in possession any halibut while using any net or nets other than bait nets for the capture of other species of fish, nor shall any license or permit held by any vessel under these regulations be valid during the use or possession on board of any net or nets other than bait nets, provided that the character and the use of said bait nets conform to the laws and regulations of the country where they may be utilized and that said bait nets are utilized for no other purpose than the capture of bait for said vessel.

15. These regulations shall supersede all previous regulations adopted pursuant to the Convention between the United States of America and the Dominion of Canada for the preservation of the halibut fishery of the northern Pacific Ocean and Bering Sea, signed January 29, 1937, except as to offenses occurring prior to the approval of these regulations. These regulations shall be effective as to each succeeding year, with the dates herein specified changed accordingly, until superseded by subsequently approved regulations. Any determination made by the International Fisheries Commission pursuant to these regulations shall become effective immediately.

EDWARD W. ALLEN, Chairman.

G. W. ICKERSON,

MILTON C. JAMES,

G. R. CLARK, Secretary.

Approved by THE PRESIDENT OF THE UNITED STATES OF AMERICA, April 6, 1951.

Approved by THE GOVERNOR GENERAL OF THE DOMINION OF CANADA, by Order in Council of April 11, 1951, P.C. 1771.

Published by the International Fisheries Commission, April, 1951.

§ 70a. Jurisdiction; claims considered; offsets and counter claims.

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all pay-

ments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award. Aug. 13, 1946, c. 959, § 2, 60 Stat. 1050.

JUDGMENT OR DECREE OF COURT BELOW

7 Ind. Cl. Com. 477

BEFORE THE INDIAN CLAIMS COMMISSION

MAKAH INDIAN TRIBE, a corporation, *Plaintiff*, vs. UNITED STATES OF AMERICA, *Defendant*.	Docket No. 60

FINAL ORDER

Based upon the findings of fact this day filed herein, which are hereby made a part of this order, and in accordance with its opinion filed this day, the Commission concludes as a matter of law that the petitioner herein is not entitled to recover in this case.

IT IS THEREFORE ORDERED, That the claims asserted in this cause be, and the same are, hereby dismissed.

Dated at Washington, D.C., this 15th day of April, 1959.

EDGAR E. WITT
Chief Commissioner

WM. M. HOLT
Associate Commissioner

FILE COPY

SUPREME COURT, U.S.
FILED
MAR 28 1961
JAMES R. BROWNING, Clerk

No. 764

In the Supreme Court of the United States

OCTOBER TERM 1960

MAKAH INDIAN TRIBE, a corporation, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Treaty provision involved	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Kennedy v. *Becker*, 241 U.S. 556	7
Tulee v. *Washington*, 315 U.S. 681	6

Treaty:

Treaty of January 31, 1855, 12 Stat. 939, Article IV	2, 3, 6

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OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. App. 3A-18A) is reported at 7 Ind. Cl. Com. 477. The order of the Court of Claims (Pet. App. 1A-2A) is not reported.

JURISDICTION

The order of the Court of Claims was entered December 1, 1960 (Pet. App. 1A). The petition for a writ of certiorari was filed on February 27, 1961. The jurisdiction of this Court is invoked under 28

U.S.C. 1255(1). See also Section 20(c) of the Indian Claims Commission Act of August 13, 1946 (25 U.S.C. 70s).

QUESTION PRESENTED

Whether the enforcement of regulations pursuant to international agreement controlling fishing for seal and halibut in waters of the North Pacific Ocean constituted a partial taking of the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations" which was "secured to said Indians in common with all citizens of the United States" by a 1855 treaty.

TREATY PROVISION INVOLVED

Article IV of the Treaty with the Makah Tribe, concluded January 31, 1855, 12 Stat. 939, provides:

> Article IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

STATEMENT

The Court of Claims has affirmed without opinion, Judge Madden dissenting, a judgment of the Indian Claims Commission dismissing, after trial, a claim

for $10,000,000 for alleged deprivation of fishing rights reserved under Article IV of the 1855 Treaty. The findings of the Commission, as well as the Commission's opinion (Pet. App. 3A-18A), state the facts in detail. In brief, they are as follows:

The Makah Tribe in Washington state is one of a group of fish-eating Indians inhabiting the northwestern United States and adjoining Canada (Fdgs. 1-6, Pet. App. 4A-6A). The Treaty of 1855 was one of several negotiated with Indian tribes of the area at about the same time, all of which contained similar provisions protecting fishing rights. The Indians hunted seals by "pelagic fishing," *i.e.*, by spearing or harpooning them at sea (Fdg. 7). Unrestricted hunting by fire arms threatened extinction of the seals and resulted in an arbitration with Great Britain and ultimately, in 1911, in an International Convention which was implemented by legislation (Fdgs. 9-10). All of the agreements and statutes exempt Indian fishing in their customary manner in open canoes without firearms (Fdgs. 9-10). The Indians, for reasons other than the governmental regulations, have abandoned their traditional method of sealing (Fdg. 12).

As to halibut fishing, progress of civilization depleted the yield so that International Agreement was necessary primarily to limit the fishing season (Fdgs. 13-21). The regulations thereunder apply to the Indians. The Commission found that the halibut restrictions "are fair, reasonable, and absolutely necessary to conserve, protect, and rehabilitate the halibut species" (Fdg. 21). It further found (Fdg. 21):

(3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, and in no sense was this treaty provision a guarantee of future commercial fishing rights.

(4) Petitioner has failed to prove that in complying with the regulations of the halibut Commission, or by their enforcement, the individual members of petitioner tribe suffered a deprivation to the extent that they are unable to sustain their immediate wants or that of their families consistent with a subsistence economy.

The opinion of the Commission (Pet. App. 16A) summarizes the findings as to the present situation as to halibut fishing as follows:

> While the regulations on certain occasions might prove somewhat irksome and inconvenient to the Indians by regulating the time and manner in which they may fish for halibut, it has been the growth and sharp competition of commercial fishing more than anything else that has interfered with the Makah's *ability* rather than their *right* to fish. Customary "hand line" fishing methods as practiced by the Makahs with their present equipment cannot compete volume wise with the "long line" commercial fishing boats, and acquiring and outfitting a modern fishing vessel is prohibitively expensive to the petitioner tribe. [Emphasis by the Commission.]

Discussing the cases in this Court, the Commission concluded that fishing rights under the 1855 Treaty were subject to regulation for conservation purposes

(Pet. App. 8A-11A). It concluded that the governmental actions concerning seals were necessary conservation measures and do not abrogate the right reserved in the 1855 Treaty (Pet. App. 14A). A similar conclusion was reached as to halibut fishing, as follows (Pet. App. 17A-18A):

> The Commission, therefore, is of the opinion that the Makah fishing rights reserved under the 1855 treaty are in no sense commercial rights, and on the contrary mean simply that the Makah Indians, as in the case of other west coast fish eating Indians, were to continue to have the right of taking fish and other marine products from the usual and accustomed places in order to satisfy immediate wants and provide the necessary sustenance for themselves and their families consistent with their then subsistence economy.

ARGUMENT

The petitioner's claim is to a right of commercial sealing and fishing free of the restrictions applicable to all other commercial fishermen imposed for conservation purposes. It is erroneous both in fact and in law.

1. As a matter of treaty construction, the Commission's factual conclusion, concurred in by the Court of Claims, that the parties could not have referred in 1855 to the commercial taking of seals and halibut, but rather referred to the practice then followed by the natives of sealing and fishing for their own subsistence and personal use, is clearly correct (Pet. App. 17A-18A). The very wording of Article

IV of the Treaty as a whole, *supra*, p. 2, referring to rights "in common with all citizens of the United States," and the erection of "temporary houses for the purpose of curing," and to the "privilege of hunting and gathering roots and berries," confirms this view. Certainly, it is not to be assumed that by this treaty Congress undertook to tie its hands or to subject the United States to a large liability when, in the future, it should establish conservation controls to preserve the resources from total destruction.

2. The law, as declared by this Court, sustaining the application of conservation laws to Indian fishing is equally clear. *Tulee* v. *Washington*, 315 U.S. 681, the latest pronouncement on the subject, states (p. 684):

> From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U.S. 375, 384; *Seufert Bros. Co.* v. *United States*, *supra*, 198-199 [249 U.S. 194].

This Court there also said (p. 684):

> We think the state's construction of the treaty is too narrow and the appellant's too broad; that,

> while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.

In *Kennedy* v. *Becker*, 241 U.S. 556, the Court held that Indian hunting and fishing privileges were subject to New York State conservation measures, saying (pp. 563-564):

> We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised.

There is no suggestion in these decisions that the Indians are exempt from general state conservation law and that some special rule applies as to Indians. Unrestricted commercial fishing has the same effect on the fish supply whether the commercial equipment be operated by white men, Indians or persons of any other race.

CONCLUSION

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully,

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
Attorney.

MARCH, 1961

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